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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,
Appellees.

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I

GIVEN THE INTEREST OF A WELFARE RECIPIENT FACED WITH THE LOSS OF HER MEANS OF SUBSISTENCE, A HEARING AFTER TERMINATION CANNOT JUSTIFY THE ABSENCE OF BASIC PROCEDURAL PROTECTIONS IN THE INFORMAL CONFERENCE.

There can be no dispute that for the vast majority of welfare recipients the termination of their subsistence grant will result in severe hardship and irreparable injury. Despite the fact that welfare recipients in California are allowed to maintain personal property reserves and still be

eligible for assistance it cannot be seriously contended that the statutory provisions ipso facto mean that recipients do, in reality, have such reserves.[1]

Statistics compiled by the California State Department of Social Welfare clearly show that most recipients have no personal property reserves at all. A study of the AFDC program (the largest public assistance program in California) indicates that as of July, 1966, two-thirds of all AFDC families had *no* personal property reserves and only 8% had personal property reserves in the form of liquid assets (cash and securities). The study also shows that of those with personal property reserves, two-thirds had property valued at less than $200. The average value of personal property of all families having such reserves was $163.55. [California State Department of Social Welfare, Division of Research and Statistics Reports dated June 5, 1967 and May 29, 1967. (Copies of these reports are set forth in their entirety in the Appendix to this brief at pp. 1a-2a.)]

Not only are most recipients devoid of any personal reserves to cushion the loss of their regular recurring welfare grants, but their grants are woefully inadequate to even meet their current ongoing needs.[2]

As the individual circumstances of Mrs. Wheeler demonstrate, the loss of a recurring welfare grant results in extreme hardship and great deprivation (A. 24). The fact

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1. Old Age Security recipients are permitted to retain personal property reserves up to $1,200, while AFDC families are allowed to retain up to 600. Cal. Welf. & Inst. C. §§11154 and 11257.

2. Statistics of the California State Department of Social Welfare indicate that average OAS grants as of June 30, 1968 were $101.91, average Aid to Blind grants were $135.23, average Aid to the Totally Disabled grants were $117.72 and average AFDC grants were $177.60 per family or $44.64 per individual AFDC recipient. A State superior court judge recently found that families forced to live on present welfare grants suffer irreparable injury, including malnutrition among children. *Ivy v. Montgomery*, Cal. Sup. Ct., S.F. Cty. No. 592705 (Sept. 11, 1969), Finding of Fact No. 45.

that retroactive payments can be awarded if aid is erroneously terminated is no answer to the injury which will result from such a termination. C.f. *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) where this court recognized in an unemployment compensation case that:

> "Even the hope of a future award of back money may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds." 389 U.S. at 239.

Severe injury would result even if post termination hearing decisions were rendered within sixty days from the date of request in compliance with HEW requirements. But, as appellees concede, California has failed to adhere to the federal time limits. (Appellees' Brief, p. 17, n. 26)[3]

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3. As of June 30, 1969, approximately 50% of the hearings pending before the State Department of Social Welfare had been pending for more than three months. SDSW, Division of Research and Statistics, draft Table 62 prepared for the as yet unpublished 1968-1969 Annual Statistical Report. This table was received by appellants' attorneys on October 4, 1969 from Wilbur Parker, Chief, Research and Statistics Division and is set forth below:

TABLE 62
APPEALS
Number Pending at the End of the Fiscal Years, by Elapsed Time from Date of Filing as of June 30, 1968, and June 30, 1969

Time elapsed from date of filing	Appeals pending			
	June 30, 1969		June 30, 1968	
	Number	Percent	Number	Percent
Total	2,487	100.0	2,169	100.0
Less than 1 month	327	13.1	284	13.1
1 to 3 months	596	24.1	652	30.1
3 to 6 months	423	17.0	746	34.4
6 to 9 months	274	11.0	244	11.2
9 to 12 months	180	7.2	121	5.6
1 to 2 years	229	9.2	96	4.4
More than 2 years	49	2.0	26	1.2
Pending Office of Administrative Procedure	409	16.4	—	—

When the interest of a welfare recipient in the continued receipt of her public assistance grant is analyzed in light of the realities of life on public assistance, can there be any doubt that the strictest forms of procedural protections are necessary before the right to receive assistance is withdrawn? Whether the right to receive assistance is viewed as a vested right,[4] statutory entitlement,[5] or mere privilege, the fact remains that a substantial private interest is at stake.

As a unanimous three judge court has recently stated in striking down a New York welfare statute as violative of the equal protection clause:

> "Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to 'insure domestic tranquility' and 'promote the general Welfare.' Emplicit in these phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be

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4. One commentator has noted that there is a vested right to public assistance in California. "In respect to State legislation, only California has enacted vested rights concepts into its welfare statute." Graham, *Public Assistance: The Right to Receive, The Obligation to Repay*, 43 NYU L. Rev. 451, 467 (1968).

5. Appellees agree that persons who meet the statutory criteria for public assistance receive aid as a matter of statutory entitlement in California. [A. 55]; see also Brief for Appellees pp. 19-25 in the case of *Goldberg v. Kelly*, No. 62, October Term, 1969.

labelled a 'right,' 'privilege' or 'benefit.' See *Sherbert v. Verner*, 374 U.S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights." *Rothstein v. Wyman*, 69 Civ. 2763 (SDNY, Aug. 4, 1969) at p. 16-17.

II

APPELLEES HAVE FAILED TO DEMONSTRATE ANY VITAL STATE INTEREST WHICH WOULD JUSTIFY A RELAXATION OF THE PROCEDURAL SAFEGUARDS TRADITIONALLY ASSOCIATED WITH ADJUDICATIVE HEARINGS.

Appellees attempt to justify the informal conference before termination of welfare assistance on the grounds of administrative convenience, noting that there are many thousands of recipients of public assistance in California[6]

6. Although appellants technically represent only the class of Old Age Security (hereinafter "OAS") recipients in California, the informal conference regulation at issue applies to all recipients of aid under the federally supported welfare programs. As of June, 1968, there were 1,285,804 recipients of cash grants in California. Of this number, 291,348 were receiving OAS, 12,357 were receiving Aid to the Blind, 147, Aid to the Potential Self-Supporting Blind, 118,318, Aid to the Totally Disabled. The largest number of recipients were in the Aid to Families with Dependent Children (AFDC) program. A total of 785,099 adults and children were receiving aid under this program. Approximately one-half of this cost of the programs was met by federal funds provided under the Social Security Act, California State Department of Social Welfare (hereinafter "SDSW"), Research and Statistics Division, *Public Welfare in California: The Annual Statistical Report 1967-68*, Table 1.

and that many decisions must be made regarding their eligibility. (Appellees' Brief p. 6) Certainly, administration convenience alone could not justify the informal conference. As this court stated in *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292, 304-305 (1937):

> "The right to [a fair and open] hearing is one of the rudiments of fair play assured to every litigant by the 14th Amendment as a minimal requirement. *There can be no compromise on footing of convenience or expediency, or because of a natural desire to be rid of harassing delay,* when that minimal requirement has been neglected or ignored." (Emphasis added)

Appellees further assert that "protection of the fisc" has not been abandoned as a reason to justify the informal conference. Nowhere in appellees' brief or in the record before this court is there any support for the proposition that the State of California will be seriously disadvantaged if termination of public assistance is preceded by adequate notice and an opportunity for the type of hearing asserted by appellants to be constitutionally required in the welfare context.

By the State's own figures, the effect on California of having welfare assistance continue until a "fair hearing" decision has been de minimus. In the period September 20, 1968 to August 31, 1969, only 86 recipients had aid continue pending the fair hearing in accordance with the court order in *McCullough v. Terzian* (No. 379011, Cal. Sup. Ct. Alameda Cty., May 12, 1968) at a cost of only $15,217.38. [California SDSW, Research and Statistics Division, *Restoration of Aid Payments Following Filing of Affidavit. Cases and Amounts of Monthly Payment by County* (September 8, 1969).] Since the federal government now provides financial reimbursement in the form of matching funds for continuation of public assistance pending the fair hearing, the

direct cost to the State is even less. [H.E.W., Federal Handbook, Pt IV, Section 6500(b) (set forth in full in Appellants' Brief, App. 12a)].

Moreover, as appellees acknowledge the State can obtain restitution for any funds improperly paid out. Appellees' Brief p. 12; Cal. Welf. & Inst. C. §§ 12203, 12205. In addition, the State has sufficient protections in the form of criminal penalties for any fraudulent receipt of public assistance. See e.g. Cal. Welf. & Inst. C. § 12251.[7]

III

THE INFORMAL CONFERENCE PROVIDED BEFORE TERMINATION IS NOT A HEARING, BUT AN ADJUSTMENT PROCEDURE FOR THE POSSIBLE RESOLUTION OF CLAIMS.

The informal conference lacks almost all of the elements traditionally associated with adjudicative hearings and makes a mockery of appellees' tactical concession that some hearing is required before welfare assistance is terminated or suspended.

Appellees' brief confirms what appellants have already made clear to this court—that welfare recipients are subject to an elaborate scheme of investigation and reinvestigation to determine eligibility. Once found eligible, however, a recipient should be entitled to an adequate opportunity to demonstrate that the county welfare department's initial determination of ineligibility is in error.[8]

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7. Despite the inadequacy of welfare grants and the intolerable conditions in which welfare recipients find themselves, recent studies in California have indicated that the extent of welfare fraud is less than 1%. A report of the fifteen month survey of welfare fraud conducted by the California SDSW release in December, 1965, found that established fraud amounted to a "fraction of 1/30 of 1% of the total AFDC caseload." Calif. SDSW, *News Release,* December 10, 1965.

8. Appellees attempt to bolster their inadequate notice provisions by asserting the notice form (*i.e.*, "You are no longer dis-

An opportunity to confer with the very person who led the investigation and who, under the regulations cited by appellees, has already met with the recipient, cannot provide a forum for the adjudication of serious disputes between the recipient and the county. A county determination of ineligibility is to be made even when evidence is conflicting or inconsistent when the county concludes *in its view* that the preponderance of the evidence supports the decision to terminate. PSS Reg. 40-155.15 (set forth in full in Appellees' Brief, App. II, p. 11.)

As a final filter to clear up obvious misunderstandings or to explain the reasons in detail for the decision to terminate, the conference might serve some function. However, it is a function clearly distinct from that traditionally served by an adjudicative hearing.

Surely, a recipient, at the critical point in time when the continued receipt of her grant is in jeopardy, is entitled to more than a procedure which permits three days for preparation, no cross-examination, no disinterested arbiter, no record, and possibly no decision at all.[9] In defense of the notice requirement appellees contend that the recipient's case record is always available for inspection; hence, greater notice is unnecessary. (Appellants' Brief, pp. 9-10.) To this contention there are two replies. First, what need is there for a recipient—even one under investigation—to retain a lawyer or representative to review her file before she is advised that her grant will be terminated?

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abled") must be accompanied by a letter of explanation. However, the sending of such a letter is *not required* by State regulation, but merely deemed advisable. SDSW, Operations Manual, 22-203.4, set out in full in Appellees' Brief, App. III, p. 22. As with most recommendations, until made mandatory it will be and has been disregarded.

9. PSS Reg. 44-325.434(c) requires that at the informal conference the matter be discussed informally "for purposes of clarification and, *where possible, resolution.*" (Emphasis added)

Certainly, if she believes she is eligible, she would assume that a decision to terminate would not be made. Welfare recipients engaged in a daily battle to survive on inadequate grants will not, and certainly cannot move to defend themselves before they are notified that a defense is necessary. Second, the entire case record is not available to a recipient. Significantly, the identity of informers is withheld from the recipient. PSS Reg. 48-013.1 (set out in full in Appellees' Brief, App. III, p. 20).

As a final justification for the informal conference, appellees catalog a variety of post-conference procedures which appellees ironically assert afford recipients additional due process (Appellees' Brief, pp. 16-18.) However, a recipient's aid does not continue while these procedures are being explored or while the recipient waits for a fair hearing decision. Hence, in terms of the type of hearing appellants assert is necessary *prior* to termination, these remedies are of little consolation.

Dated: October 7, 1969.

Respectfully submitted,

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Appendix 1a

State of California
Department of Social Welfare

Research and Statistics
June 5, 1967

AID TO FAMILIES WITH DEPENDENT CHILDREN
Family Group Cases
July 1966

Table Types of Personal Property Owned

	Type of Property	Families — Number	Families — Percent	
	Total	142,044	100.0	
	Owns no personal property	94,885	66.8	
	Owns personal property	47,159	33.2	100.0[1]
23%	Automobile	33,011		70.0
8%	Life insurance	12,167		25.8
	Cash and securities	11,648		24.7
	Other personal property	990		2.1

[1]Categories do not add to 100 percent because some families own more than one type of personal property.

Two-thirds of the AFDC families owned no personal property. Of those which did, seven out of ten owned an automobile.

Appendix 2a

State of California
Department of Social Welfare

Research and Statistics
May 29, 1967

AID TO FAMILIES WITH DEPENDENT CHILDREN
Family Group Cases
July 1966

Table Value of Personal Property Owned

	Families		
	Number	Percent	
Total	142,044	100.0	
Does not own personal property	95,027	66.9	
Owns personal property	47,017	33.1	100.0
Less than $50	7,288		15.5
$50 - 99	5,783		12.3
100 - 149	11,847		25.2
150 - 199	6,770		14.4
200 - 299	7,006		14.9
300 - 399	4,185		8.9
400 - 499	2,351		5.0
500 - 599	1,787		3.8
Average value of property, for families with personal property	$163.55		

One in three AFDC families has personal property.
Of those that do, two-thirds have property valued at less than $200.